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No. 88-300

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

THE NATIONAL RIFLE ASSOCIATION OF AMERICA, NEAL KNOX, WILLIAM B. BINSWANGER, WARREN CASSIDY, THE NATIONAL RIFLE ASSOCIATION POLITICAL VICTORY FUND, and MICHAEL K. MCCABE,

Petitioners,

v.

MINNESOTA STATE ETHICAL PRACTICES BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

In its Opposition to NRA's Petition, Respondent rephrases the "Question Presented For Review," stating that the issue is whether a district court must vacate a judgment, pursuant to Fed. R. Civ. P. 60(b)(4), "even though jurisdiction may be lacking provided there was an arguable basis for the exercise of jurisdiction and not

a total want of jurisdiction." This question is not, however, the question presented by this case.

In the first place, subject-matter jurisdiction *is* lacking. See, *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983). Thus, this case is not one where subject-matter jurisdiction "may" be lacking. Second, the meaning of the phrase "a total want of jurisdiction" is an important aspect of the actual question presented for this Court's resolution; thus, asserting that there was "not a total want of jurisdiction" in the instant case merely begs the question. Notably, the lower court in the instant case wrote that the only issue before it was "whether or not there was an arguable basis on which the finding of jurisdiction in this case could have rested." Petitioner's Appendix, at 7a. In short, therefore, Respondent's phrasing of the question presented does not accurately represent the actual issue presented by this case; this Court should thus utilize the question presented by Petitioners.

REASONS FOR GRANTING THE PETITION

I. The Decision Of The Lower Court was Erroneous.

The essence of Respondent's initial argument is its statement that "an erroneous assumption of subject matter jurisdiction is . . . not the equivalent to a 'total want of jurisdiction,' rendering a judgment void under rule 60(b)(4). *Jones v. Giles*, 741 F.2d 245, 248 (9th Cir. 1984)." Brief in Opposition to Petition for Writ of Certiorari (hereinafter "Opposition"), at 6. This statement, aside from being wholly without support in any published decisions as demonstrated below, does not aid in the resolution the precise question presented by this case: whether the existence of an "arguable basis" on which subject-matter jurisdiction *could* have rested is a sufficient basis for denying a Rule 60(b)(4) motion. Once again, it should be emphasized that the absence or

presence of an "arguable basis" on which a finding of subject-matter jurisdiction could have rested was the only basis for the lower court's decision.

Turning to the accuracy of Respondent's statement, it is first important to note that the phrase a "total want of jurisdiction" initially appeared in *Lubben v. Selective Service System Local Board No. 27*, 453 F.2d 645 (1st Cir. 1972), and that every circuit court opinion since that time has relied on the language and reasoning in that case.[1] It is thus important to emphasize that, in *Lubben*, the First Circuit *equated* the "absence of subject-matter jurisdiction" to a "total want of jurisdiction" in distinguishing the absence of subject-matter jurisdiction "from an error in the exercise of jurisdiction." 453 F.2d at 649. Indeed, if the absence of subject-matter jurisdiction is not a "total want of jurisdiction"—as Respondent implies—it is impossible to conceive of a situation where there would be a "total want of jurisdiction." The reason for the First Circuit's finding is simple and straightforward: being a court of limited jurisdiction, either a district court has subject-matter jurisdiction or it does not. An "erroneous assumption of subject-matter jurisdiction" does not, moreover, change in any way the fact that, as a matter of law, subject-matter jurisdiction is lacking.

The Ninth Circuit decision relied upon by Respondent does not support its assertion. Indeed, *Jones v. Giles*, 741 F.2d 245 (9th Cir. 1984), is an example of a case where there was not a "total want of jurisdiction" (since subject-matter jurisdiction existed) but where there was "an error in the exercise of jurisdiction." As the Ninth Circuit stated clearly,

> the court had original jurisdiction over the case pursuant to 28 U.S.C. § 1337(a), and there is no ques-

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[1] Despite *Lubben* being the seminal case in this area of law, no where does Respondent mention it.

> tion that the court had jurisdiction under 29 U.S.C. § 216(b) to decide whether appellees' overtime claims were exempt from the FLSA. Even assuming that the court erred in deciding the applicability of 29 U.S.C. § 213(b)(1), that error has no bearing on the court's power to decide those issues. 741 F.2d at 248.

Jones thus stands in stark contrast to the instant case since, in the instant case, the district court plainly did not have subject-matter jurisdiction pursuant to 28 U.S.C. 1441. See *Franchise Tax Board, supra.* Moreover, *Jones* does not even hint that a judgment is void only when there is *both* a "total want of jurisdiction" *and* no "arguable basis" on which subject-matter jurisdiction could have rested. Thus, *Jones* is clearly in conflict with the decision in the instant case.

In view of the above, there is clearly uncertainty among the circuits regarding the meaning of the now-widely used phrase "a total want of jurisdiction." Thus, whether or not the existence of an "arguable basis" for a finding of subject-matter jurisdiction is a sufficient basis to grant Rule 60(b)(4) relief, this Court, having never visited this narrow but important issue, should now do so.

II. The Decision in this Case is in Direct Conflict with this Court's Jurisprudence.

First, while it is true that *Insurance Corporation of Ireland v. Compagnie Des Bauxites*, 456 U.S. 694 (1982), addressed the issue of subject-matter jurisdiction on direct appeal, there is nothing in the unqualified opinion which in any way suggests that the principles set forth therein do not apply to Rule 60(b)(4) motions. Indeed, Respondent has not cited a single authority, from any court or any commentator, supporting its assertion. As a result, it is apparent that the decision in the instant case

—which effectively holds that a federal district court *may* decide a case when it lacks subject-matter jurisdiction—*is* "truly" in conflict with *Insurance Corporation of Ireland* and should be reviewed by this Court.

Second, as it has continued to do throughout this litigation, Respondent suggests that Petitioners may not " 'reopen [the] question [of subject-matter jurisdiction] on collateral attack upon an adverse judgment.' *Insurance Corporation of Ireland*, 456 U.S. at 702 n.9." Opposition, at 9. As Respondent then notes, however, NRA's Rule 60(b)(4) motion is not in fact a "collateral attack." Thus, the quotation from the *Insurance Corporation of Ireland* footnote is inapposite. Nonetheless, Respondent goes on to urge that "the fundamental rational behind the [technical] rules [of preclusion] should apply with equal force to a challenge of a final decision by the same parties in the same case." Opposition, at 10. In support of that assertion, Respondent cites *Arizona v. California*, 460 U.S. 605 (1983). It is difficult to understand, however, why Respondent cites *Arizona v. California* since, in that case, this Court expressly held that "[i]t is clear that res judicata and collateral estoppel *do not apply* if a party moves the rendering court in the same proceeding to correct or modify its judgment." (emphasis added) 460 U.S. at 619.

Respondent also quotes from *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981). This case is, however, wholly inapposite to the instant case since it involved two separate lawsuits.[2]

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[2] Respondent rhetorically asks, if the fundamental rationale behind the technical rules of preclusion do not apply "to a challenge of a final decision by the same parties later in the same case . . ., what is to prevent the litigants from returning to this Court a third or fourth time with the same argument in the same case?" Opposition, at 10. The simple answer to that question is that, once the issue in the Rule 60(b)(4) motion is resolved in the context of the motion, *res judicata* does apply to that issue in a subsequent Rule 60(b)(4) motion. This, however, is not such a case.

III. The Courts of Appeals for the Second and Eighth Circuits are in Direct Conflict with Five other Courts of Appeals.

Respondent asserts that "most of the circuits cited by NRA as 'in conflict' with the present decision have subsequently adopted and utilized the standard NRA is so troubled with." Opposition, at 11. In fact, as even a cursory review demonstrates, not a single circuit of those relied upon by Petitioner—nor any others—has "adopted and utilized" the "arguable basis" standard which Respondent seeks to have this Court uphold.[3]

Turning to the specific cases, Respondent first asserts that, in *Gould v. Mutual Life Insurance Company of New York*, 790 F.2d 769 (9th Cir. 1986), *cert. denied*, —— U.S. —— (1986), the court denied a Rule 60(b)(4) motion "despite the lack of subject matter jurisdiction. . . ." Opposition, at 11-12. Respondent does not cite language from the opinion to support this assertion as well as it could not since the Ninth Circuit expressly held exactly the opposite: that "the court below *had* subject-matter jurisdiction." (emphasis added). 790 F.2d at 774. Moreover, *Gould* cited with approval a prior opinion, *Watts v. Pickney*, 752 F.2d 406 (9th Cir. 1985) in which the Ninth Circuit had held that "a district court is 'compelled to exercise its authority under Rule 60(b)(4) to vacate' judgments in which it had erroneously asserted its own jurisdiction." 790 F.2d at 774. Thus, it is evident that the controlling rule in the Ninth Circuit is that, if there is an error in the assertion of subject-matter jurisdiction, a Rule 60(b)(4) motion to

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[3] While Respondent implies that Petitioners complain that it is the distinction between the treatment accorded an error in the exercise of jurisdiction and that accorded a total want of jurisdiction, this is false; it is the use of an "arguable basis" standard in conjunction with the total want of jurisdiction standard in determining whether to grant a Rule 60(b)(4) motion to which Petitioners object.

vacate *must* be granted. It follows, therefore, that the Ninth Circuit is in direct conflict with the Second and Eighth Circuits.[4]

The Sixth Circuit's decision in *Hooks v. Hooks*, 771 F.2d 935 (6th Cir. 1985) is, contrary to Respondent's assertion, entirely consistent with the principle set forth in the Sixth Circuit's earlier opinion in *Jordon v. Gilligan*, 500 F.2d 701 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975) and in no way adopts—it does not even allude to—the "arguable basis" standard adopted by the Second and Eighth Circuits. Indeed, *Hooks* expressly relies upon the First Circuit's decision in *Lubben, supra*, in which the First Circuit *equated* the absence of subject matter jurisdiction to a total want of jurisdiction. Moreover, in explaining that the lower court "certainly had potential jurisdiction over the dispute" and that it only "may have erred in determining that it retain continuing jurisdiction," 771 F.2d at 950, *Hooks* made clear that the Sixth Circuit, unlike the Second and Eighth Circuits, recognized the distinction between a total want of jurisdiction and a mere error in the exercise of jurisdiction.

In attempting to argue that there is no conflict between the First Circuit and the Second and Eighth Circuits, Respondent briefly discusses *Honneus v. Donovan*, 691 F.2d 1 (1st Cir. 1982) leaving out any discussion of *Lubben, supra*, the seminal case in this area and the case that demonstrates the conflict between the First Circuit and the Second and Eighth Circuits. Moreover, there is nothing in *Honneus* that suggests that the "arguable basis" standard adopted by the Second and Eighth Circuits would be acceptable in the First Circuit. Indeed, *Honneus*, emphasizes that "a judgment is either void

[4] The Ninth Circuit's prior opinion in *Jones v. Giles, supra*, is not to the contrary since, as the court noted in *Jones*, the District Court "had original jurisdiction over the case . . . and there is no question that the court had jurisdiction . . . to decide" the case before it. 741 F.2d at 248.

or it is not," 691 F.2d at 2, thus recognizing that the presence of an "arguable basis" would be immaterial in deciding a Rule 60(b)(4) motion.

Next, Respondent asserts that "the Seventh Circuit has, in fact, adopted the standard" adopted by the Eighth and Second Circuits. Opposition, at 13. In support of that assertion, Respondent cites *United States v. Zima*, 776 F.2d 1153 (7th Cir. 1985). Even a cursory reading of *Zima* fails to reveal that the Seventh Circuit has adopted the "arguable basis" standard adopted by the Eighth and Second Circuits. Quite the contrary, *Zima* held that a judgment *is* void "if the court has no power to adjudicate the issues before it." 766 F.2d at 1159. Thus, the court did not grant the Rule 60(b)(4) motion because the district court "initially had the power to exercise jurisdiction over the ancillary claims." 766 F.2d at 1159. By contrast, in the instant case, the district court did not initially, or ever, have jurisdiction over Respondent's claims.[5]

Finally, Respondent asserts that the decision in *Potomac Passengers Association v. Chesapeake and Ohio Railway Company*, 520 F.2d 91 (D.C. Cir. 1975) is "irrelevant to the present dispute." Opposition, at 14. While it is true that *Potomac Passengers Association* was not a Rule 60(b)(4) case, the District of Columbia Circuit recognized that

> [if] a federal court is powerless to adjudicate a controversy, it is duty-bound to recognize that fact, however belated its realization. . . . when an appellate court makes so fundamental an error as that of sus-

[5] Respondent asserts that the distinction between a total want of jurisdiction and an error in the exercise of jurisdiction "is precisely the point in the present case." Opposition, at 14. In fact, it is not at all the point in the present case. The point in the present case is whether the existence of an "arguable basis" for subject-matter jurisdiction, where no subject-matter jurisdiction exists, is a sufficient ground to deny a Rule 60(b)(4) motion.

> taining federal subject-matter jurisdiction where none exists, we think the court must exercise its discretion to correct that mistake. 520 F.2d at 95, n.22.

Plainly, this language is relevant to the instant case since the court stressed that a court is "duly bound" to vacate a judgment where subject-matter jurisdiction is absent "however belated its realization. . . ." In so saying, the District of Columbia Circuit Court simply gave meaning to the Court's mandate that, in the context of subject-matter jurisdiction, "principles of estoppel do not apply. . . ." *Insurance Corporation of Ireland*, 456 U.S. at 701.

Were Respondent's assertion true that this Court's decision in *Insurance Corporation of Ireland* and the District of Columbia's Circuit's opinion in *Potomac Passengers Association* are not relevant to the instant case, Rule 60(b)(4) would effectively be eviscerated and of little value. Plainly, however, Rule 60(b)(4) has some purpose; that purpose is to allow, if nothing else, judgments made without subject-matter jurisdiction to be vacated.

IV. A Writ of Certiorari is Appropriate in this Case.

Respondent's primary assertion is the fact that "the injury to NRA, if any, is an entirely self-inflicted strategic error." Opposition, at 15.

It should be noted first that *Insurance Corporation of Ireland* made clear that, when challenging subject-matter jurisdiction, "principles of estoppel do not apply. . . ." 456 U.S. at 701. Thus, even if Respondent's assertion was entirely accurate, it is, as a matter of law, wholly immaterial.

Second, as Respondent concedes, it "withdrew its motion to remand. . . ." Opposition, at 2-3. Thus, the fact that the issue of subject-matter jurisdiction has had to have been litigated in the context of a Rule 60(b)(4) motion is, in large part, due to a conscious decision by Respondent not to raise the issue at an early time in the litigation.

Finally, the removal petition filed by Petitioner was filed by Petitioners' *former* counsel, who was relieved by Petitioners after the initial appeal to the Eighth Circuit. Certainly, extreme limitations on the future exercise of Petitioners' First Amendment rights—which will certainly be the result if this Petition is not granted—should not remain in place simply because of an erroneous decision —which even Respondent recognized was erroneous—by Petitioners' former counsel. Indeed, as this case, at bottom, involves the ability of Petitioners to exercise their First Amendment rights, the subject-matter jurisdiction of the District Court should not merely be "arguable," but should be certain and wholly justified. As subject matter jurisdiction in the instant case is certainly in doubt, it is exceedingly appropriate that a Writ of Certiorari be granted in the instant case.

CONCLUSION

For the reasons set forth above and in the Petition for a Writ of Certiorari, this Court should issue a Writ of Certiorari to the Eighth Circuit.

Respectfully submitted,

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